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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PHELPS D. VANN and CHARLES E. LAWHORN,	)	
Plaintiffs,	)	
vs.	)	**Case No. 03-4009-JAR**
THOMAS E. WHITE, SECRETARY OF THE ARMY,	)	
Defendant.	)	

MEMORANDUM AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This comes before the Court on Defendant's Motion to Dismiss (Doc. 9). Plaintiffs' Complaint charges Defendant and its agents with discriminatory, unlawful and retaliatory employment practices expressly prohibited by 42 U.S.C. § 2000e-2 and 42 U.S.C. § 2000e-3. The Complaint alleges that Defendant was a "joint employer" of Plaintiffs, along with Raytheon Aerospace, LLC (Raytheon). Defendant alleges that Plaintiffs were not employees of the Army, and therefore moves to dismiss Plaintiff's Title VII action pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Plaintiffs have not responded to Defendant's motion to dismiss.

Standard for Rule 12(b)(1) Motion Challenging Subject Matter Jurisdiction

When a Rule 12(b)(1) motion challenges the facts upon which subject matter jurisdiction depends, "a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)."[1] Reliance on evidence outside the pleadings in addressing such a motion does not, as a general rule, convert the motion to one for summary judgment under Fed. R. Civ. P. 56.[2] An exception to this general rule is recognized where "the jurisdictional question is intertwined with the merits of the case."[3] The subject matter jurisdiction and the merits are considered intertwined "[w]hen subject matter jurisdiction is dependent upon the same statute which provides the substantive claim in the case."[4] "Unlike the strict limitations under 12(b)(6) against considering matters outside the complaint, a 12(b)(1) motion is considered a 'speaking motion' and can include references to evidence extraneous to the complaint without converting it to a Rule 56 motion."[5] Thus, the Court begins its analysis under Rule §12(b)(1) rather than under Rule 12(b)(6).[6]

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[1] *Sizova v. Nat'l Inst. of Stds. & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002) (citing *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995)(citations omitted)).

[2] *Id.*

[3] *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987), *cert. denied* 484 U.S. 986 (1987) (citations omitted); *see also Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir. 2000); *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 (10th Cir. 1996).

[4] *Wheeler*, 825 F.2d at 259 (citations omitted); *see also Pringle*, 208 F.3d at 1223.

[5] *Wheeler,* 825 F.2d at 259 n. 5 (citations omitted).

[6] The court may not dismiss a cause of action for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure unless it appears beyond doubt that the claimant can prove no set of facts supporting its claim which would entitle it to relief. In considering a Rule 12(b)(6) motion, the court must assume as true all well-pleaded facts, as distinguished from conclusory allegations, and must draw all reasonable inferences in favor of the

(continued...)

Material Undisputed Facts

As Rule 12(b)(1) allows, Defendant has submitted affidavits and documents outside of the pleadings, and has further complied with the requirements of Rule 56 of the Federal Rules of Civil Procedure,[7] in setting forth a statement of material undisputed facts supported with reference to the record, affidavits and authenticated documents. Based on Defendant's submission and Plaintiffs' failure to controvert these statements, the Court finds that the following are material, undisputed facts.

Plaintiffs Phelps D. Vann and Charles E. Lawhorn worked for Raytheon as heavy equipment operators and as automotive workers at Equipment Concentration Site Number 33 ("ECS #33") located at Fort Riley, Kansas. There were two primary types of laborers at ECS #33: U.S. Army wage grade ("WG") employees and Raytheon contract workers. The Raytheon workers were provided pursuant to a contract and delivery order between Raytheon and the 89th Regional Support Center ("RSC"), located in Wichita, Kansas. The Basic Contract (F34601-97-D-0425) and Delivery Order 0092 between Raytheon and the Army applied to the 89th RSC and ECS #33 from July 1, 2001 through June 30, 2002.

The contract clearly provides that Raytheon, not the Army, had total control and supervision of its employees, which included the plaintiffs, Vann and Lawhorn. Incorporated in the Basic Contract is Section H, Special Contract Requirements. A subsection of Section H is

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[6](...continued)
nonmovant. *Housing Auth. of Kaw Tribe of Indians of Oklahoma v. City of Ponca City*, 952 F.2d 1183, 1187 (10th Cir. 1991), *cert. denied* 504 U.S. 912 (1992); *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support its claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984).

[7]Defendant has also complied with D.Kan. Rule 56.1(a).

titled H-906, Basis for Performance, and states:

> Contractor personnel are employees of the contractor and under its administrative control and supervision. The contractor through its personnel, shall perform the tasks prescribed herein or in orders issued hereunder. **Contractor shall select, supervise and exercise control and direction over its employees under this contract**. The contractor and its employees shall not supervise, direct or control the activities of Government personnel or the employees of any other contractor. **The Government shall not exercise any supervision or control over the contractor's employees in their performance of contractual services under this contract**. The contractor is accountable to the Government for the action of its personnel. (emphasis added)

Delivery Order 0092, *inter alia*, required the Army to identify the number and skill of the Raytheon workers to perform work at ESC #33. Further, the Army determined the place of performance, the specific work requirements, and set the work priorities and schedule. Raytheon was responsible for providing qualified workers and managing those workers to meet the Army's work requirements. The contract further provided, *inter alia*, that the Army provide personnel at ECS #33 to monitor and evaluate the contractor's performance, coordinate the required logistical support, determine work priorities and schedules, and to conduct final inspection and acceptance of contractor [Raytheon] work.

The fact that the plaintiffs were employees of Raytheon was made clear through the terms of the Delivery Order itself, which provided:

> Contract personnel are employees of the contractor and under his administrative control. The contractor through his personnel will perform the tasks prescribed herein. The contractor or his employees shall not supervise, direct, or control the activities of Army personnel or the employees of other contractors. The contractor is accountable to the government for the action of his/her personnel.

Other documents signed by both plaintiffs evidence and confirm the employer/employee relationship between plaintiffs and Raytheon. Simply stated, the Complainants worked for

Raytheon Aerospace LLC on a contract specifically for the Army. There was no contract between Vann and Lawhorn and the Army.

Raytheon maintained a high degree of independence from the Army. Raytheon, not the Army, selected "individuals for layoff, recall, and rehire." Raytheon also briefed each of its new or rehired employees that Raytheon employees receive their assignments from Raytheon lead men who report to Raytheon site managers, who in turn, report to company program managers located at the Raytheon Contract Field Team program office in Del City, OK. This arrangement was supported by Contract clause H-906, that sets out the employment relationship between Army personnel and Raytheon personnel.

A Raytheon supervisor assigned work to Vann and Lawhorn; and they reported to a Raytheon supervisor who was physically located at Fort Riley, Kansas. Vann's and Lawhorn's performance evaluations were completed by Raytheon without input from Army officials. Any leave requests by Vann and Lawhorn were submitted to and approved by a Raytheon supervisor.

Raytheon paid Vann and Lawhorn, based on a Nationwide Area Wage Determination from the Department of Labor. Vann's and Lawhorn's compensation and associated taxes were paid and withheld by Raytheon. All forms of insurance, including medical, life, short-term disability and workers compensation were paid by Raytheon.

On or about February 1, 2002, Raytheon, acting through its ESC #33 Site Supervisor, Patrick Ponce, informed Vann and Lawhorn that their Raytheon positions at ECS #33 would be eliminated as of February 25, 2002. Before Vann's and Lawhorn's release from ECS #33, Ponce informed both Plaintiffs of an open Raytheon position in Welbourne Springs, Missouri. Neither Vann nor Lawhorn accepted the Raytheon position in Welbourne Springs, Missouri.

Both Vann and Lawhorn state they were "discipline[d]" on February 15, 2002, when they received a Raytheon letter of counseling. On February 25, 2002, Raytheon terminated the employment of both Vann and Lawhorn.

On May 9, 2002, Vann's and Lawhorn's attorney filed EEO complaints on behalf of both Plaintiffs. On May 17, 2002, the EEO Officer dismissed their complaints for a failure to state a claim under 29 C.F.R. §1614.107(a)(1), finding that they were not Army employees. This finding was based in part on Raytheon's submission of documents indicating that it had an "at will" working relationship with Vann, Lawhorn and other employees, and the authority to select which individuals to layoff or recall. On June 3, 2002, Vann and Lawhorn appealed the dismissal to the EEO Commission, Office of Federal Operations ("OFO"). On October 29, 2002, the EEOC OFO affirmed the dismissal of their complaints, finding that "the [Army] did not maintain the means and manner of control over the complainants' day to day work necessary to be considered a 'joint employer.'" On January 28, 2003, Vann and Lawhorn filed the instant action.

Discussion

In *Bristol v. Bd. Of County Comm'rs, et al,*[8] the Tenth Circuit established the test for determining if a contract employee receives government employee status for Title VII purposes, stating that the "joint-employer test acknowledges that the two entities are separate, but looks to whether they co-determine the essential terms and conditions of employment."[9] *Bristol*

[8] 312 F.3d 1213 (10th Cir. 2002).

[9] *Bristol*, 312 F.3d at 1218 (citations omitted).

considered "the essential terms and conditions of employment" to be the ability to hire and fire, the budgetary authority of each entity, and the degree of independence of each entity.[10] In adopting the joint employer test, the Tenth Circuit was guided by the Eleventh Circuit's opinion in *Virgo v. Riviera Beach,*[11] as well as the Third Circuit's opinion in *Graves v. Lowery.*[12]

In *Virgo*, the court held that Riviera Beach and Sterling Group were joint employers of all employees at the Sheraton Ocean Inn. Under the terms of their management agreement, Sterling Group had the authority to run the day to day operations of the hotel; while Riviera Beach reserved the right to pay the employees compensation and other operational costs, and Riviera Beach had the authority and responsibility over any labor negotiations respecting the employees. The management agreement also stated that all employees, including the resident manager, were in the employment of Riviera Beach.[13] Thus, although an independent company managed the hotel, Riviera Beach was a joint employer, since it "retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer."[14]

In *Graves*, the court determined that the plaintiffs' complaint pled sufficient facts to establish that they had been jointly employed by the judicial district and the county government. The plaintiffs, who had been clerks in a state judicial district, were nevertheless covered by the

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[10] *Id.* at 1219-1221.

[11] *Virgo v. Riviera Beach Assocs., LTD,* 30 F.3d 1350 (11th Cir. 1994).

[12] 117 F.3d 723 (3d Cir. 1997).

[13] *Virgo*, 30 F.3d at 1360.

[14] *Id.*

county's personnel policies. The clerks had been told they were county employees, and they were subject to termination and/or reinstatement by the county. It was the county who investigated the clerks' complaints of sexual harassment. And, the county had actually hired two of the plaintiff clerks.[15]

The Court concludes that Vann and Lawhorn were employees of Raytheon and were not jointly employed by the defendant. Raytheon hired the plaintiffs and plaintiffs reported to a Raytheon supervisor. Their work performance was evaluated by their Raytheon supervisor; and any disciplinary action was taken by Raytheon. The plaintiffs' wages were set by Raytheon; and their salary and insurance benefits were paid and provided by Raytheon. There simply is no evidence suggesting that defendant retained or reserved any authority or responsibility for hiring, firing, reinstating, evaluating, disciplining or compensating the plaintiffs. Raytheon maintained its own budgetary authority over its company and employees; and Raytheon maintained a high degree of independence from the Army.

The Court therefore concludes that plaintiffs were not jointly employed by the defendant and thus the Court lacks subject matter jurisdiction; and plaintiffs cannot state a claim against the Army under Title VII.[16]

IT IS THEREFORE ORDERED that Defendant's motion to dismiss (Doc. 9) is GRANTED under Rules 12(b)(1) and 12(b)(6) and this action is DISMISSED WITH PREJUDICE.

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[15] *Graves*, 117 F.3d at 729.

[16] 42 U.S.C.§ 2000e, *et seq.*

IT IS FURTHER ORDERED that Defendant's motion to stay discovery (Doc. 11) is moot and therefore DENIED.

IT IS SO ORDERED.

Dated this 21st day of July, 2003.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge